8 JUNE 2020

EMPLOYMENT ALERT

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CLIFFE DEKKER HOFMEYR

Video conference consultation, the new normal?

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In *Food and Allied Workers Union (FAWU) v South African Breweries*, the Labour Court, amongst other things, had to decide whether video conferencing was an appropriate means to consult in a retrenchment process during the lockdown period. The judgment shows that parties have to be adaptable and embrace the use of technology to accommodate health and safety concerns in the time of COVID-19, in what is sure to be the new normal for some time.

In early January 2020, the company commenced a restructuring process. Because of the large numbers of potentially affected employees, section 189A of the Labour Relations Act (the LRA) applied. The company opted for CCMA facilitation in the consultation process. The parties agreed to a facilitation timetable. After the facilitation process had commenced, the President announced the State of Disaster and level 5 lockdown.

In light of the lockdown, physical face-to-face consultations were not possible. There were two options open to the consulting parties: conduct the remaining consultations by video conferencing or postpone the process. The facilitator proposed that the remaining consultations be held via the popular video conferencing app, Zoom. The union's opposition to this proposal was so vehement that the facilitator recused himself and another facilitator was appointed.

In light of the union's refusal to participate in the consultation process, if it was to be done by video conferencing; the company continued with the process and began to populate its new structure. Notices of termination of employment were issued to affected employees.

This led to the union bringing an urgent application to the Labour Court to compel the company to comply with a fair procedure in the consultation process and interdicting it from, amongst other things, proceeding with the consultation process without the physical attendance of the union in the facilitated process.

Ironically, the union agreed to have the urgent application heard by means of Zoom - the very application they were so vehemently opposed to. The union complained that the Zoom application was inefficient and unreliable and that it could not replace physical consultation.

The court found that section 189 of the LRA did not prescribe the form that consultation must assume. In fact, section 189(6)(b) suggested that the process could be conducted by correspondence.

The court found that the union's insistence on physical consultations was self-serving and ignorant of the bigger issue of health and safety. It found that with the new normal in the lockdown period, video conferencing was an appropriate form in which meetings could take place. In response to the union's criticism about

Video conference consultation, the new normal?*...continued*

Consultations provide an opportunity for an exchange of views and the establishment of a dialogue. Meaningful consultation entails early stage consultation, providing adequate information, time to respond and genuinely considering the response.

connectivity issues the court held that where technology was used that teething problems were to be expected. This, however, did not relegate the technology to obsoleteness or make its use unfair. In these circumstances video conferencing was a necessary tool to ensure that restrictions like social distancing as a measure to avoid the spread of the virus was observed. Consultation by video conferencing accorded with the new normal and was actually fair.

Consultations provide an opportunity for an exchange of views and the establishment of a dialogue. Meaningful consultation entails early stage consultation, providing adequate information, time to respond and genuinely considering the response.

On the issue of the incomplete consultation process the court found that the union had unreasonably refused to participate in the process because of the use of the Zoom app. It was not the fault of the company that the union chose to abandon the process.

The application was dismissed.

This judgment shows us how the COVID-19 pandemic has accelerated the fourth industrial revolution. It illustrates further that parties involved in labour relations have to adapt to the new normal, whether it be the embrace of technology or other new ways of working. They cannot cling indefinitely to the old way of work.

Jose Jorge and Chanté du Plessis

CLIFFE DEKKER HOFMEYR

"With great power comes great responsibility"- a brief look at ostensible authority in the workplace

The material facts before the court were that Eskom decided to unilaterally award salary increases to a category of employees, in order to ensure those employees' salaries were market related.

Ostensible or apparent authority is the authority of an agent as it appears to others. In the context of employment law, ostensible authority could lead to a situation where an employer may be held to commit to a certain action even though it was not properly authorised. The following recent case illustrates how this could ensue.

Eskom Holdings SOC Ltd v National Union of Mineworkers & others (2020) 41 ILJ 1125 (LAC)

This was an appeal in the Labour Appeal Court (LAC) that concerned a contractual claim for arrear salaries. The question before the court was whether the appellant (Eskom) had lawfully awarded ad hoc salary increases to the respondents (employees).

The material facts before the court were that Eskom decided to unilaterally award salary increases to a category of employees, in order to ensure those employees' salaries were market related. Accordingly, this change was communicated and accepted without further agreement between Eskom and the employees.

The employees' general manager, who was not authorised, signed and sent a letter to the employees setting out their revised salary. When the employees received their salary slips, however, the amounts reflected were less than the amounts set out in the letter.

The aggrieved employees approached management for an explanation and were informed that the general manager who had signed the letter had no authority to do so. Subsequently, the employees were notified of the correct salary adjustments. The employees were unsatisfied with the explanation received and approached the Labour Court with a contractual claim for specific performance in terms of section 77(3) of the LRA which gives the Labour Court concurrent jurisdiction with civil courts.

The Labour Court upheld the employees' claim that the general manager who had signed the letters containing the initial ad hoc salary adjustments had the authority to sign the letters. Hence, Eskom was bound by such letter.

The evidence on appeal

The decision by members of ESKOM to increase salaries had been communicated to relevant managers in a memorandum by the divisional head of the human resources department of Eskom. This memorandum stated that the remuneration of the employees had to ensure salaries were as close as possible to market related salaries. This comparison was reflected in a spreadsheet and the increases approved by the executive manager.

The situation turned sour when the human resources department, made an error by reflecting the increases incorrectly. The amounts reflected in the letter signed by the general manager to which this dispute refers were not in fact the authorised amounts. Furthermore, the general manager that signed the letters, was not the office-bearer with the authority to approve the salary increases as contained in the letter.

"With great power comes great responsibility"- a brief look at ostensible authority in the workplace

...continued

Accordingly, the LAC found that no valid contract between the parties providing for the initial salary increases could have lawfully come into existence in the absence of authorisation by the divisional managing director.

This was supported by the contents of an agreement in respect of the basic salary for bargaining unit employees which contained a clause which read as follows:

> *'all ad hoc salary agreements must be approved by the relevant divisional managing director. HR practitioners are, therefore, requested to ensure that all the ad hoc salary adjustments are approved by the relevant divisional managing director prior to processing the requested increase'.*

The employees were fully aware of the clause in this agreement.

Furthermore, there was no evidence that the divisional managing director had approved the salary increases relied upon by the employees.

Findings

Accordingly, the LAC found that no valid contract between the parties providing for the initial salary increases could have lawfully come into existence through the letter signed by the general manager, in the absence of authorisation by the divisional managing director.

The court also referred to the doctrine of ostensible authority and stated that there is no evidence to suggest that the employees were misled into believing that any ad hoc salary increase could have been granted without the required approval.

On this basis, the appeal was upheld and the Labour Court judgment was set aside.

It is important that employers are very clear regarding the process and procedure surrounding the authorising of actions such as offers of salary or other adjustments. In the event that the employees in this case had been faced with a different situation, namely being able to provide evidence of having been misled as to the manager's authority to sign these letters, the employees may have been able to rely on the doctrine of ostensible authority in order to strengthen their claim.

Hugo Pienaar, Asma Cachalia and Jessica van den Berg

OUR TEAM

For more information about our Employment practice and services, please contact:

Aadil Patel
National Practice Head
Director
T +27 (0)11 562 1107
E aadil.patel@cdhlegal.com

Michael Yeates
Director
T +27 (0)11 562 1184
E michael.yeates@cdhlegal.com

Anli Bezuidenhout
Senior Associate
T +27 (0)21 481 6351
E anli.bezuidenhout@cdhlegal.com

Jose Jorge
Director
T +27 (0)21 481 6319
E jose.jorge@cdhlegal.com

Mohsina Chenia
Executive Consultant
T +27 (0)11 562 1299
E mohsina.chenia@cdhlegal.com

Sean Jamieson
Senior Associate
T +27 (0)11 562 1296
E sean.jamieson@cdhlegal.com

Fiona Leppan
Director
T +27 (0)11 562 1152
E fiona.leppan@cdhlegal.com

Faan Coetzee
Executive Consultant
T +27 (0)11 562 1600
E faan.coetzee@cdhlegal.com

Bheki Nhlapho
Senior Associate
T +27 (0)11 562 1568
E bheki.nhlapho@cdhlegal.com

Gillian Lumb
Director
T +27 (0)21 481 6315
E gillian.lumb@cdhlegal.com

Avinesh Govindjee
Consultant
M +27 (0)83 326 5007
E avinash.govindjee@cdhlegal.com

Asma Cachalia
Associate
T +27 (0)11 562 1333
E asma.cachalia@cdhlegal.com

Hugo Pienaar
Director
T +27 (0)11 562 1350
E hugo.pienaar@cdhlegal.com

Riola Kok
Consultant
T +27 (0)11 562 1748
E riola.kok@cdhlegal.com

Tamsanqa Mila
Associate
T +27 (0)11 562 1108
E tamsanqa.mila@cdhlegal.com

Thabang Rapuleng
Director
T +27 (0)11 562 1759
E thabang.rapuleng@cdhlegal.com

BBBEE STATUS: LEVEL TWO CONTRIBUTOR
Our BBBEE verification is one of several components of our transformation strategy and we continue to seek ways of improving it in a meaningful manner.

JOHANNESBURG
1 Protea Place, Sandton, Johannesburg, 2196. Private Bag X40, Benmore, 2010, South Africa. Dx 154 Randburg and Dx 42 Johannesburg.
T +27 (0)11 562 1000 F +27 (0)11 562 1111 E jhb@cdhlegal.com

CAPE TOWN
11 Buitengracht Street, Cape Town, 8001. PO Box 695, Cape Town, 8000, South Africa. Dx 5 Cape Town.
T +27 (0)21 481 6300 F +27 (0)21 481 6388 E ctn@cdhlegal.com

STELLENBOSCH
14 Louw Street, Stellenbosch Central, Stellenbosch, 7600.
T +27 (0)21 481 6400 E cdhstellenbosch@cdhlegal.com

CLIFFE DEKKER HOFMEYR